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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 MICHAEL R.,

7 Plaintiff,

8 v.

9 COMMISSIONER OF SOCIAL  
SECURITY,

10 Defendant.

CASE NO. 3:18-CV-05493-DWC

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY  
BENEFITS

11 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of  
12 Defendant's denial of Plaintiff's application for disability insurance benefits ("DIB"). Pursuant  
13 to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties  
14 have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 5.

15 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")  
16 erred when she did not apply *res judicata* to the findings of a prior ALJ's decision. Had the ALJ  
17 properly considered the prior findings, the residual functional capacity ("RFC") may have  
18 included additional limitations. The ALJ's error is therefore not harmless, and this matter is  
19 reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Social Security  
20 Commissioner ("Commissioner") for further proceedings consistent with this Order.

21 FACTUAL AND PROCEDURAL HISTORY

22 Plaintiff has filed two applications for DIB that are relevant to this case. Plaintiff filed his  
23 first application on June 20, 2011, alleging disability as of March 1, 2009. *See* Dkt. 9,  
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1 Administrative Record (“AR”) 131. The application was denied upon initial administrative  
2 review and on reconsideration. *See* AR 131. A hearing was held before ALJ Cheri Filion on  
3 November 19, 2012. AR 89-127. In a decision dated January 14, 2013, ALJ Filion determined  
4 Plaintiff to be not disabled. AR 131-48. Plaintiff’s request for review of ALJ Filion’s decision  
5 was denied by the Appeals Council, making ALJ Filion’s decision the final decision of the  
6 Commissioner. *See* AR 14; 20 C.F.R. § 404.981, § 416.1481. Plaintiff did not appeal to the  
7 District Court. AR 14.

8 On March 17, 2014, Plaintiff filed a second application for DIB, alleging disability as of  
9 February 4, 2013. AR 14. The application was denied upon initial administrative review and on  
10 reconsideration. *See* AR 14. A hearing was held before ALJ Mary Gallagher Dilley on February  
11 9, 2017. AR 44-88. In a decision dated May 19, 2017, ALJ Dilley determined Plaintiff to be not  
12 disabled. AR 14-34. Plaintiff’s request for review of ALJ Dilley’s decision was denied by the  
13 Appeals Council, making ALJ Dilley’s decision the final decision of the Commissioner. *See* AR  
14 1-3; 20 C.F.R. § 404.981, § 416.1481. Plaintiff now seeks review from the Court of the ALJ’s  
15 May 19, 2017 decision.<sup>1</sup>

16 In Plaintiff’s Opening Brief, Plaintiff maintains the ALJ erred by: (1) failing to give  
17 proper deference to the prior ALJ’s findings; (2) improperly determining the severity of  
18 Plaintiff’s impairments; and (3) improperly conducting the materiality analysis for drug  
19 addiction and alcoholism (“DAA”). Dkt. 11, pp. 2-19. Plaintiff requests the Court remand this  
20 case for an award of benefits. *Id.* at 2.

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23 <sup>1</sup> When stating “the ALJ” or “the ALJ’s decision” throughout this Order, the Court is referencing ALJ  
24 Dilley and her May 19, 2017 decision. When stating “the prior ALJ” or “the prior ALJ’s decision” throughout this  
Order, the Court is referencing ALJ Filion and her January 14, 2013 decision.

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## DISCUSSION

Plaintiff argues the ALJ did not give proper deference to the prior ALJ's findings of severe impairments.

Even where a claimant has rebutted the presumption, *res judicata* requires that findings about a claimant’s RFC, education, or work experience, or other finding required at a step in the sequential evaluation process, must be adopted “unless there is new and material evidence

1 related to those findings or a relevant change in law or methodology.” *Harrington v. Berryhill*,  
2 No. C17-5846-MAT, 2018 WL 4103661, at \*4 (W.D. Wash. Aug. 29, 2018); *see also* SSAR 97-  
3 4(9). One of the findings required at a step in the sequential evaluation process is whether the  
4 claimant has severe limitations. 20 C.F.R. § 404.1520(c). Thus, the ALJ must apply *res judicata*  
5 to a prior ALJ’s findings that the claimant has severe impairments. *See* Hearings, Appeals, and  
6 Litigation Law Manual (“HALLEX”) I-5-4-60 (Dec. 28, 1998).<sup>2</sup>

7 In the first decision, ALJ Filion found Plaintiff had the following severe impairments:  
8 methicillin-resistant staphylococcus aureus (“MRSA”), hepatitis C, obesity, degenerative disc  
9 disease, anxiety disorder, depressive disorder, and drug and alcohol abuse. AR 134. ALJ Filion  
10 found Plaintiff could perform “less than the full range of medium work.” AR 136. As a result,  
11 ALJ Filion concluded Plaintiff was not disabled. AR 148.

12 In the second decision, ALJ Dilley noted the prior ALJ’s decision created a presumption  
13 of continuing nondisability. AR 14. The ALJ determined Plaintiff had rebutted this presumption  
14 because he had attained a higher age category since the first decision. AR 14. The ALJ then  
15 found Plaintiff had the following severe impairments: depressive disorder, with reported  
16 psychotic features; generalized anxiety disorder; and polysubstance abuse. AR 18. The ALJ thus  
17 made different findings regarding Plaintiff’s MRSA, hepatitis C, obesity, and degenerative disc  
18 disease. Accordingly, the ALJ was required to explain the “new and material evidence” that led  
19 her to reject the prior ALJ’s findings regarding Plaintiff’s severe impairments. *See Harrington*,  
20 2018 WL 4103661, at \*4; *see also* SSAR 97-4(9).

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22 <sup>2</sup> HALLEX “is strictly an internal Agency manual, with no binding legal effect on the Administration or  
23 [the] court.” *Clark v. Astrue*, 529 F.3d 1211, 1216 (9th Cir. 2008) (citing *Moore v. Apfel*, 216 F.3d 864, 868-69 (9th  
24 Cir. 2000)). As an agency manual, it is nonetheless “‘entitled to respect’ under *Skidmore v. Swift & Co.*, [323 U.S.  
134] (1944), to the extent that it has the ‘power to persuade.’” *Clark*, 529 F.3d at 1216 (citing *Christensen v. Harris*  
*Cnty.*, 529 U.S. 576, 587 (2000)).

1 The ALJ determined Plaintiff's hepatitis C, obesity, and "back problems" were non-  
2 severe because of a lack of documented complaints about them since Plaintiff's alleged onset  
3 date. AR 19-20. However, the ALJ did not specifically address the prior ALJ's finding that  
4 Plaintiff's MRSA was a severe impairment. The ALJ stated only that "[t]here is no evidence of  
5 any physical limitations since the alleged onset date of February 2013." AR 30. The ALJ did not  
6 address any new and material evidence regarding Plaintiff's MRSA, and she did not connect this  
7 conclusory statement to any evidence from the first decision regarding Plaintiff's MRSA. Thus,  
8 the ALJ erred in not applying *res judicata* to the prior ALJ's finding that Plaintiff's MRSA was a  
9 severe impairment.

10 "[H]armless error principles apply in the Social Security context." *Molina v. Astrue*, 674  
11 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the  
12 claimant or "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v.*  
13 *Commissioner*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674 F.3d at 1115. The Ninth  
14 Circuit has stated "a reviewing court cannot consider an error harmless unless it can confidently  
15 conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a  
16 different disability determination." *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015)  
17 (quoting *Stout*, 454 F.3d at 1055-56). The determination as to whether an error is harmless  
18 requires a "case-specific application of judgment" by the reviewing court, based on an  
19 examination of the record made "'without regard to errors' that do not affect the parties'  
20 'substantial rights.'" *Molina*, 674 F.3d at 1118-19 (quoting *Shinseki v. Sanders*, 556 U.S. 396,  
21 407 (2009)).

22 Had the ALJ applied *res judicata* to the prior ALJ's findings regarding severe  
23 impairments, the RFC may have included additional limitations. For example, in the first  
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1 hearing, Plaintiff testified he has MRSA outbreaks four to five times a year, which causes him  
2 severe pain. AR 99. Plaintiff also testified he missed five days to two weeks per month because  
3 of his MRSA outbreaks. AR 100. The vocational expert testified at the hearing that employers  
4 would not tolerate more than one day per month of unscheduled absenteeism. AR 85. Thus, if the  
5 ALJ had given weight to Plaintiff's reports about his severe impairments, the RFC may have  
6 included additional limitations regarding Plaintiff's absenteeism, which may have altered the  
7 conclusion of non-disability. Accordingly, the ALJ's error was not harmless.

8 **II. Whether the ALJ improperly evaluated the severity of Plaintiff's impairments.**

9 Plaintiff argues the ALJ improperly determined Plaintiff's other impairments, such as  
10 ADHD, were non-severe. Dkt. 11, pp. 10-11. The Court finds the ALJ committed harmful error in  
11 not applying *res judicata* to the prior ALJ's findings. *See* Section I, *supra*. Because the ALJ on  
12 remand must re-evaluate the prior ALJ's findings regarding severe impairments, the Court also  
13 directs the ALJ to re-evaluate the severity of Plaintiff's other impairments.

14 **III. Whether the ALJ improperly conducted the DAA materiality analysis.**

15 Plaintiff argues the ALJ erred when she found his impairments were not disabling in the  
16 absence of DAA. Dkt. 11, pp. 12-18. The Court finds the ALJ committed harmful error in not  
17 applying *res judicata* to the prior ALJ's findings. *See* Section I, *supra*. Because the ALJ on  
18 remand must re-evaluate Plaintiff's severe impairments, the Court also directs the ALJ to re-  
19 assess the DAA materiality analysis in light of possible new findings regarding Plaintiff's  
20 impairments and how they interact with Plaintiff's addiction issues.

21 **IV. Whether this case should be remanded for an award of benefits.**

22 Lastly, Plaintiff requests the Court remand this case for an award of benefits. Dkt. 14, p. 18.  
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1 The Court may remand a case “either for additional evidence and findings or to award  
2 benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court  
3 reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the  
4 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th  
5 Cir. 2004) (citations omitted). However, the Ninth Circuit created a “test for determining when  
6 evidence should be credited and an immediate award of benefits directed.” *Harman v. Apfel*, 211  
7 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

8 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the  
9 claimant’s] evidence, (2) there are no outstanding issues that must be resolved before  
10 a determination of disability can be made, and (3) it is clear from the record that the  
11 ALJ would be required to find the claimant disabled were such evidence credited.

12 *Smolen*, 80 F.3d at 1292.

13 In this case, the Court has directed the ALJ to re-evaluate the prior ALJ’s findings of severe  
14 impairments. *See* Section I, *supra*. Because outstanding issues remain regarding the severity of  
15 Plaintiff’s impairments, remand for further consideration of this matter is appropriate.

### 16 CONCLUSION

17 Based on the foregoing reasons, the Court hereby finds the ALJ improperly concluded  
18 Plaintiff was not disabled. Accordingly, Defendant’s decision to deny benefits is reversed and  
19 this matter is remanded for further administrative proceedings in accordance with the findings  
20 contained herein. The Clerk is directed to enter judgment for Plaintiff and close the case.

21 Dated this 19th day of December, 2018.

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23 David W. Christel  
24 United States Magistrate Judge